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10/587,267

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Robert Hendrik Catharina Janssen

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ROBERT HENDRIK CATHARINA JANSSEN

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Appeal 2010-003707  
Application 10/587,267  
Technology Center 1700

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Before BRADLEY R. GARRIS, CHUNG K. PAK, and MARK NAGUMO,  
*Administrative Patent Judges.*

NAGUMO, *Administrative Patent Judge.*

DECISION ON APPEAL

A. Introduction<sup>1</sup>

Robert Hendrik Catharina Janssen (“Janssen”) timely appeals under 35 U.S.C. § 134(a) from the final rejection<sup>2</sup> of claims 1-13, which are all of the pending claims. We have jurisdiction. 35 U.S.C. § 6. We AFFIRM.

The subject matter on appeal relates to halogen-free, flame retardant thermoplastic polyester compositions.

Claim 1 is representative and reads:

1. Halogen free flame-retarded thermoplastic polyester moulding composition which consists of:
  - (A) a polymer composition consisting of a
    - a) 30-67 mass % of at least one thermoplastic polyester polymer, and
    - b) 0-15 mass % other polymers, of which other polymers 0-0.5 mass % is a fluorine polymer,
  - (B) a flame retardant system consisting of
    - a) 33-55 mass % melamine cyanurate,
    - b) 0 to less than 2 mass % of a phosphorous [sic: phosphorus] containing flame retardant not comprising elementary phosphorous [sic], and

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<sup>1</sup> Application 10/587,267, *Halogen-Free Flame-Retarded Polyester Composition*, filed 26 July 2006 as the national stage of an international application filed 28 January 2005, and claiming the benefit of an EPO application filed 30 January 2004. The specification is referred to as the “267 Specification,” and is cited as “Spec.” The real party in interest is listed as DSM IP Assets B.V. (Appeal Brief, filed 8 September 2009 (“Br.”), 2.)

<sup>2</sup> Office action mailed 6 April 2009.

c) 0-5 mass % of an inorganic flame retardant synergist not comprising phosphorous [sic], and  
(C) 0-10 mass % other additives, of which other additives 0-5 mass % are fibrous reinforcing agents, and wherein the sum of components (A) - (C) totals 100 mass % and all the mass percentages are relative to the total mass of the composition.

(Claims App., Br. 16; indentation and paragraphing added.)

The Examiner has maintained the following grounds of rejection:<sup>3</sup>

Claims 1-13 stand rejected under 35 U.S.C. § 103(a) in view of each of Mogami,<sup>4</sup> Yamamoto,<sup>5</sup> Saiki,<sup>6</sup> Yoshihara,<sup>7</sup> or Tanaka.<sup>8</sup>

#### B. Discussion

Findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

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<sup>3</sup> Examiner's Answer mailed 13 October 2009 ("Ans.").

<sup>4</sup> Kenji Mogami et al., *Additive for Thermoplastic Resins and Flame Retardant Resin Composition*, U.S. Patent 5,684,071 (1997).

<sup>5</sup> Masanori Yamamoto and Shintarou Kishimoto, *Fire Retardent Polyester Resin Composition and Process for Producing the Same*, U.S. Patent 5,770,644 (1998).

<sup>6</sup> JP 09-14346 (1997) (The Examiner has relied only on the abstract: Ans. 4).

<sup>7</sup> JP 11-080519 (1999) (The Examiner has relied only on the abstract: Ans. 4).

<sup>8</sup> JP 2003-076088/ (2003) (The Examiner has relied only on the abstract: Ans. 4).

The Examiner finds that the claims of Yamamoto encompass compositions comprising a thermoplastic polyester and melamine cyanurate within the scope of the amounts recited in claim 1, and that the other additives can be present in amounts that are within the limits recited in claim 1. (Ans. 3.)

Similarly, the Examiner finds that flame retardant polyester resin compositions recited in claim 9 of Mogami include compositions in which the relative amounts of components meet the limitations recited in appealed claim 1.

The Examiner finds further that the abstracts of each of Saiki, Yoshihara, and Tanaka recite compositions encompassing amounts of polyester resin and melamine cyanurate required by the appealed claims. (Ans. 4.)

The Examiner concludes that it would have been obvious to select melamine cyanurate in amounts sufficient to yield a flame-retardant polyester composition. (Ans. 4.)

Janssen argues Yamamoto requires more phosphorus compound than the appealed claims permit. (Br. 10.) Moreover, according to Janssen, all the examples in Yamamoto suggest that much lower amounts of melamine compound and much higher amounts of phosphorus compounds be used in fire retardant polymer compositions. (*Id.* at 11, 2d full para.) Janssen argues further that Yamamoto discloses the presence of many optional components, such as glass fibers, that exceed the amount allowed by the appealed claims. ((*Id.* at 10-11.)

The Examiner responds that the lower limit of 2.05 parts phosphate [i.e., parts (C) and (D)] in Yamamoto claim 1 “is sufficiently close to the ‘less than 2 wt. %’” recited in appealed claim 1 that the lower recited amount would have been obvious. (Ans. 4.) Notwithstanding the characterization of 2.0 parts of a phosphoric ester compound (D) as a lower limit by Yamamoto, we are not persuaded that persons having ordinary skill in the art would have concluded that the properties of polyester compositions having slightly less than 2.0 parts of phosphorus compounds would have been significantly less fire-retardant, particularly when other fire-retardant materials, such as the melamine cyanurate [part (G)], are also present. Janssen has not directed our attention to credible evidence in the record that a disproportionate change in properties occurs at 2.0 parts of this component.

Janssen’s arguments based on the examples are not persuasive of harmful error. It is well-settled that disclosures are not limited to the examples. *In re Inland Steel Co.*, 265 F.2d 1354, 1361 (Fed. Cir. 2001). It is also well-settled that a reasonable expectation of success suffices to support a case of prima facie obviousness. *In re O’Farrell*, 853 F.2d 894, 903-04 (Fed. Cir. 1988). Moreover, patented subject matter is presumptively supported by an enabling disclosure for the entire scope of the claims. *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1355 (Fed. Cir. 2003) (“[W]e hold a presumption arises that both the claimed and unclaimed disclosures in a prior art patent are enabled.”) In any event, Janssen has not disputed the Examiner’s findings that Yamamoto’s claims encompass compositions covered by the appealed claims. Nor has Janssen argued, much less proved, that persons having ordinary skill in the art would

not have been provided with a reasonable expectation of successfully making and using fire-retardant compositions throughout the full range claimed by either Yamamoto or Mogami.

In response to Janssen's argument that the amount of polyester resin is not disclosed, the Examiner argues that 50% melamine cyanurate [component (B)], based on thermoplastic polyester [component (A)] leads to 66.66 % by weight polyester and 33.33% by weight melamine cyanurate. (Ans. 5.) Janssen has not shown why this simple explanation is incorrect. Janssen's remaining arguments against the Examiner's reliance on Mogami again focus on the examples provided by Mogami. (Br. 12.) These arguments are not persuasive of harmful error for the reasons discussed *supra*.

Finally, we note that Janssen has not supported its very brief arguments based on unexpected results (Br. 11 and 12) with credible evidence commensurate in scope with the appealed subject matter.

The remaining rejections are problematic. Janssen argues that the references applied in these rejections "are even further removed from the present invention," and questions their relevance. (Br. 13.) Janssen does little, however, to explain these remarks.

On the other hand, the Examiner finds that the Tanaka abstract "recite[s] 60-85 weight % polyester" (Ans. 4). Upon review of the abstract of record, we agree with Janssen that "Tanaka does not disclose at all the amount of thermoplastic polyester" (Br. 13). The abstract describes the range of melamine cyanurate as 15-40 % with respect to the total weight.

The Examiner has not explained why the polyester necessarily comprises the remainder of the composition, or enough of the remainder as to make up, necessarily, 30-67 mass% of the total composition as required by the appealed claims. We therefore reverse the rejection in view of Tanaka.

As for Saiki and Yoshihara, the official record of the 267 application available in the eDAN database does not appear to contain abstracts of Saiki or Yoshihara, much less translations of those documents. As the abstracts that the Examiner and Janssen discuss have not been placed before us and are not otherwise identified in the Examiner's Answer or the Brief on Appeal, we conclude that the Examiner has failed to present a prima facie case of obviousness.<sup>9</sup>

C. Order

We AFFIRM the rejections of claims 1-13 under 35 U.S.C. § 103(a) in view of Mogami or Yamamoto.

We REVERSE the rejections of claims 1-13 under 35 U.S.C. § 103(a) in view of Saiki, Yoshihara, or Tanaka.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

**AFFIRMED**

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<sup>9</sup> In view of the error demonstrated in the Examiner's characterization of the Tanaka abstract, we decline to assume the Examiner's characterizations of the other abstracts are accurate.



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